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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SANDRA TERRY, Plaintiff and Respondent, v. ATHANASIOS PREOVOLOS, Defendant and Appellant.	D060904 (Super. Ct. No. 37-2010-00094289-CU-OE-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Frederic L. Link, Judge. Affirmed.

Defendant Athanasios Preovolos (Preovolos) appeals a judgment entered after the jury awarded plaintiff Sandra Terry (Terry) $22,000 in lost wages as compensatory damages for his sexual harassment of her. On appeal, he contends that under California's Fair Employment and Housing Act (FEHA), lost wages for employee sexual harassment cannot be awarded unless the plaintiff was actually or constructively discharged from employment. We conclude an employee victim of sexual harassment under FEHA can be awarded compensatory damages, including lost wages, proximately caused by the

harassment, regardless of whether he or she has been actually or constructively discharged from employment.

FACTUAL AND PROCEDURAL BACKGROUND

From August 8, 2005, through May 14, 2010, Terry was an employee of defendant Preovolos & Associates, A Law Corporation (Firm). While employed at Firm, Terry was the executive assistant to Preovolos, an officer and managing agent of Firm.

On May 14, 2010, Terry submitted her letter of resignation to Firm that stated in part:

> "Since you have hired another person, Tammie McQuain, to essentially replace me which has resulted in me being demoted, with good cause I am quitting my employment at [Firm]. . . . [¶] . . . [¶]
>
> "After everything I have put into my job here for you, I am disappointed, hurt and offended. I have been [an] exceptional employee as long as I have worked here, in [your] exact words, and this demotion and devaluation is uncalled for. I am in shock and disgusted. Especially after all of these years I have put up with the inappropriate conduct that occurs on a daily basis in this firm, [e]specially the sexually explicit behavior, conversations, e[-]mails and jokes. I have made it clear since I began here that I feel that behavior is unacceptable in a professional environment and it makes me extremely uncomfortable. I was put in difficult situations time and time again and worried that my lack of buy-in to this behavior would eventually cost me my job here. Perhaps that is the underlying reason for my recent demotion. Since March of this year, I have grown completely intolerant of this sexual inappropriateness in our office and have let Olin Lewin and Jon Musgrove know my feelings about it. As a matter of fact, it is probably since March that you[r] attitude toward me changed so drastically.
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> "Anyone in my situation would agree that I can no longer work under these conditions."

Terry did not respond to Preovolos's letter asking her to reconsider her resignation and to discuss the matter with him.

In June 2010, Terry filed a complaint against Preovolos and Firm, alleging causes of action for: (1) sexual harassment; (2) retaliation; (3) failure to prevent sexual harassment; (4) constructive termination in violation of public policy; (5) unpaid wages; (6) failure to provide itemized pay statements; (7) failure to provide meal periods; (8) waiting time penalties; and (9) unfair business practices. At trial, Terry presented evidence that Preovolos made sexual comments and circulated e-mails of a sexual nature to members of Firm, which conduct continued throughout her employment and escalated in 2010.[1] She presented evidence that she raised her concerns about and discomfort with Preovolos's sexually charged conduct with three members of Firm's management team. She presented evidence that after she complained nothing was done to stop his sexually charged behavior and she was retaliated against for raising her concerns. She also presented evidence that Preovolos's sexually charged behavior continued after her filing of the complaint and through the time of trial.

The jury found in favor of Terry on her sexual harassment cause of action against Preovolos and Firm, but found in favor of Firm on her causes of action for retaliation and constructive discharge. The jury specifically found: (1) although Terry was not subjected to unwanted harassing conduct by Preovolos because of her sex, she witnessed his sexually harassing conduct in her work environment; (2) the harassment was severe and pervasive; (3) a reasonable woman in her circumstances would have considered the work

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1 That evidence included the testimony of Robert Martin, Firm's controller and a member of its management team, who testified that Preovolos frequently made jokes of a sexual nature, including at Firm meetings, and the conduct continued through the time of Martin's testimony at trial.

environment to be hostile or abusive; (4) she considered the work environment to be hostile or abusive; (5) she suffered harm as a result of the sexually harassing conduct; (6) Firm failed to take reasonable steps to prevent sexual harassment in the workplace; (7) she complained to Firm management about Preovolos's sexually harassing conduct; (8) she did not suffer any adverse employment action in retaliation for her complaints; and (9) her working conditions were not so intolerable that a reasonable person in her position would have had no reasonable alternative except to resign. The jury awarded Terry $22,000 in economic damages on her sexual harassment cause of action.

The trial court denied Preovolos's and Firm's motions for judgment notwithstanding the verdict and for new trial, and rejected their argument that the jury's findings did not support an award of economic damages of $22,000. On September 6, 2011, the court entered a second amended judgment awarding Terry $22,000 against Preovolos and Firm, jointly and severally.[2] On November 14, 2011, Preovolos filed a notice of appeal.[3]

DISCUSSION

I

Notice of Appeal Was Timely Filed

Terry asserts Preovolos's appeal must be dismissed because his notice of appeal was not timely filed. On September 6, 2011, the trial court entered its second amended

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2 The judgment also awarded Terry other monetary damages against Firm.

3 Firm did not file a notice of appeal.

judgment. On September 12, 2011, Terry served on Preovolos a notice of entry of judgment. On Monday, November 14, 2011, Preovolos filed a notice of appeal.

Although Preovolos's notice of appeal was filed 63 calendar days after he was served with a notice of entry of judgment, we conclude his notice of appeal was timely filed because the 60th day after service of the notice of entry of judgment was Friday, November 11, 2011, Veteran's Day, an official state and judicial holiday.[4] Saturdays and Sundays are also state holidays. (Code Civ. Proc., §§ 10, 12a, 135; Gov. Code, § 6700.) Therefore, the first judicial day after Friday, November 11, 2011, was Monday, November 14, 2011. In general, California Rules of Court, rule 8.104(a) provides that a notice of appeal must be filed on or before the *earliest of*: (1) 60 days after the superior court clerk serves the party with a notice of entry of judgment or a file-stamped copy of the judgment; (2) *60 days after the party filing the notice of appeal* serves or *is served by a party with a notice of entry of judgment* or a file-stamped copy of the judgment; or (3) 180 days after entry of judgment. Because the 60th, 61st, and 62nd days after Preovolos was served with a notice of entry of judgment were holidays, the deadline for filing his notice of appeal was extended until the first judicial day thereafter, which in this case was Monday, November 14, 2011. (Code Civ. Proc., §§ 12, 12a, 12b; Cal. Rules of Court,

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4 We grant Preovolos's request that we take judicial notice of the fact November 11, 2011, was Veteran's Day, a legal holiday. (Evid. Code, §§ 451, subd. (f), 452, subd. (h).) Veteran's Day has been declared a state holiday by the Legislature. (Gov. Code, § 6700, subd. (l).) State holidays are declared to be judicial holidays. (Code Civ. Proc., § 135.) We also take judicial notice of the fact November 11, 2011, was a Friday. (Evid. Code, § 452, subd. (h).)

rule 8.60(a); *Shufelt v. Hall* (2008) 163 Cal.App.4th 1020, 1022, fn. 2.) Preovolos's notice of appeal was timely filed.

II

Lost Wages as Compensatory Damages for Sexual Harassment

Preovolos contends the judgment against him must be reversed because lost wages for sexual harassment cannot be awarded unless the plaintiff was actually or constructively discharged from employment. He argues that because Terry resigned and the jury expressly found she had not been constructively discharged, she could not, as a matter of law, recover her lost wages as compensatory damages for his sexual harassment. He also apparently argues the evidence in this case does not show his sexual harassment proximately caused Terry's alleged lost wages.

A

Terry's complaint alleged causes of action for: (1) sexual harassment; and (2) constructive discharge from employment in violation of public policy. The jury found in favor of Terry on her sexual harassment cause of action against Preovolos and Firm, but rejected her cause of action for constructive discharge. The jury found Terry suffered harm as a result of Preovolos's sexually harassing conduct and the harassing conduct was a substantial factor in causing Terry harm. The jury found Terry suffered $22,000 in economic damages as a result of the sexual harassment. The trial court entered judgment awarding Terry $22,000 against Preovolos and Firm, jointly and severally.

B

FEHA "makes unlawful the sexual harassment of an employee by any person. (Gov. Code, § 12940, subd. [(j)(1)].) . . . Sexual harassment is defined as including ' " '[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.' " ' [Citation.] It typically is viewed as taking one or both of two forms: (1) quid pro quo harassment, where submission to sexual conduct is made a condition of concrete employment benefits, and (2) hostile work environment, defined as conduct having the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1146, fns. omitted.) Government Code section 12940, subdivision (j)(1), makes it an unlawful employment practice for any person "because of . . . sex . . . to harass an employee . . . . Loss of tangible job benefits shall not be necessary in order to establish harassment." Harassment "because of sex" includes sexual harassment and gender harassment. (Gov. Code, § 12940, subd. (j)(4)(C).) "[A]n employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.) FEHA is to be construed liberally to accomplish its purposes. (Gov. Code, § 12993, subd. (a).)

FEHA "permits individual suits for damages to enforce its provisions, but it does not specify what damages are recoverable. (See [Gov. Code,] § 12965, subds. (b), (c).)

This court [i.e., the California Supreme Court] has concluded that, in an action seeking damages for sexual harassment under [FEHA], the plaintiff may recover those damages 'generally available in noncontractual actions.' " (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042.) FEHA "offers greater protection and relief to employees than does title VII [of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (Title VII)]. . . . [Under FEHA], the courts may award unlimited compensatory and punitive damages."[5] (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 842.) "[I]n a civil action under [FEHA], all relief generally available in noncontractual actions, including punitive damages, may be obtained." (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 221 (*Commodore*).)

C

Preovolos asserts Terry cannot obtain an award of lost wages as compensatory damages because she resigned from her employment. Citing federal cases, he argues we should adopt the federal courts' so-called "majority rule" under Title VII, which rule requires an actual or constructive discharge from employment for an award of back pay for unlawful discrimination. (See, e.g., *Satterwhite v. Smith* (9th Cir. 1984) 744 F.2d 1380, 1381, fn. 1; *Hertzberg v. SRAM Corp.* (7th Cir. 2001) 261 F.3d 651, 659; *Jurgens v. E.E.O.C.* (5th Cir. 1990) 903 F.2d 386, 389.) However, Preovolos does not persuade us that the statutory language of, and public policies underlying, Title VII and FEHA are

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5 Although unlimited compensatory damages may be awarded under FEHA, punitive damages (not awarded in the instant case) are subject to certain limitations that we need not discuss. (See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416-418; *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 712.)

sufficiently similar to require the application of the federal courts' majority rule to cases involving sexual harassment or other discrimination under FEHA.

Cloud. In *Cloud v. Casey* (1999) 76 Cal.App.4th 895 (*Cloud*), the plaintiff resigned from her position after allegedly being denied a promotion based on gender discrimination. (*Id*. at p. 900.) She filed a complaint alleging causes of action for gender discrimination and constructive discharge from employment. (*Ibid*.) The trial court granted the defendants' motion for summary adjudication of the constructive discharge claim, finding the undisputed facts established as a matter of law that her resignation was not a constructive discharge. (*Id*. at pp. 900-901.) Before trial, the trial court granted the defendants' motion to exclude all evidence relating to any claim for pay (i.e., lost wages) damages following her resignation. (*Id*. at p. 901.) The jury found the defendants liable for gender discrimination. (*Ibid*.)

On appeal, *Cloud* upheld the trial court's summary adjudication of the plaintiff's constructive discharge claim, concluding that on the undisputed facts her resignation was not a constructive discharge as a matter of law. (*Cloud, supra,* 76 Cal.App.4th at p. 905.) However, *Cloud* concluded the trial court erred in precluding the plaintiff from presenting evidence of her postresignation damages caused by the defendants' gender discrimination. (*Id*. at p. 909.) In so concluding, *Cloud* rejected the defendants' argument that the federal courts' majority rule, discussed above, should apply to the plaintiff's FEHA gender discrimination claim. (*Id*. at pp. 906-909.) *Cloud* stated:

> "Neither side has cited, nor have we found, any California state court case applying the rule to limit a FEHA plaintiff's damages. But defendants argue that 10 of 11 federal circuits that have considered

> the point have applied the doctrine to limit damages in employment discrimination cases." (*Cloud*, *supra*, 76 Cal.App.4th at p. 906.)

Cloud noted federal courts recognize two policies that underlie damage awards in Title VII discrimination cases: (1) a policy to make the victim of discrimination whole; and (2) a policy that an employee should remain on the job and attack discrimination from within the work relationship to give the employer an opportunity to ameliorate the effects of discrimination. (*Cloud*, *supra*, 76 Cal.App.4th at p. 908, citing *Nobler v. Beth Israel Medical Center* (S.D.N.Y. 1989) 715 F.Supp. 570, 571.) *Cloud* agreed with *Nobler* that "where resolution of the discrimination from within the working relationship is not a viable option, there is no reason to require an employee to stay on the job or forfeit a right to postresignation damages." (*Cloud*, at p. 908.) Accordingly, *Cloud* declined to adopt a rule strictly limiting back pay and front pay damages in FEHA cases involving a failure to promote. (*Ibid*.)

Furthermore, *Cloud* cited other reasons for its refusal to adopt the federal courts' majority rule limiting Title VII awards of postresignation back pay to cases in which there has been a constructive discharge. *Cloud* noted "effective remedies under FEHA should be fashioned so as to make the individual whole." (*Cloud*, *supra*, 76 Cal.App.4th at p. 906.) It also noted the California Supreme Court in *Commodore* held that all relief generally available in noncontractual actions may be obtained in FEHA civil actions. (*Cloud*, at pp. 908-909.) It further noted that Civil Code section 3333 provides: " 'For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate *for all the detriment proximately caused* thereby, whether it could have been anticipated or

not.' " (*Cloud*, at p. 909.) *Cloud* concluded that because "the statutory objective of FEHA . . . is to make the victim of discrimination whole," the plaintiff "was entitled to prove the full extent of her damages necessary to make her 'whole,' including both back pay and front pay." (*Ibid*.)

Commodore. In *Commodore*, the California Supreme Court denied a petition for writ of mandate after the trial court denied an employer's motion to strike a request for punitive damages in a wrongful termination/race discrimination complaint filed against it. (*Commodore*, *supra*, 32 Cal.3d at pp. 214, 211.) The court noted that although FEHA does not mention punitive damages, " FEHA does not limit the relief a court may grant in a statutory suit charging employment discrimination." (*Id*. at p. 215.) It stated: "When a statute recognizes a cause of action for violation of a right, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears." (*Ibid*.) *Commodore* did not discern any contrary legislative intent. (*Ibid*.)

Commodore stated: "[Government Code] [s]ection 12965, subdivision (b), declaring the right to sue when the Department [of Fair Employment and Housing] fails to act, was added in 1977. [Citations.] Except by providing for attorney fees and costs, the subdivision does not address the subject of judicial remedies." (*Commodore*, *supra*, 32 Cal.3d at p. 215, fn. omitted.) The court then addressed the employer's assertion that FEHA is similar to Title VII and therefore should be construed as precluding compensatory and punitive damages like the federal courts in Title VII cases. (*Id*. at pp. 216-217.) The court stated:

> "The employers stress that federal statutes with similar language [e.g., Title VII] have been held not to authorize awards of either general compensatory or punitive damages. They rely in particular on interpretations of . . . section 706(g) of title VII of the Civil Rights Act of 1964 (42 U.S.C.A § 2000e-5(g) [employment discrimination]; [citations].)
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> "Yet differences between those laws and [FEHA] diminish the weight of the federal precedents. . . . [¶] . . . [T]itle VII provides for judicial handling of federal discrimination claims in civil actions by the [EEOC] or, when it declines to sue, by persons aggrieved. [Citation.] The federal statute expressly describes remedies that courts may assess. ([42 U.S.C.A.] § 2000e-5(g).) The [federal] cases hold that subdivision 5(g) is an implied limitation on courts' remedial powers.
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> "[FEHA], on the other hand, provides separate routes to resolution of claims; first, a complaint to the Department; second, if that agency fails to act, a private court action. The statute discusses remedies only in the first context; here we are concerned with those available in the second. Federal precedents do not address that problem." (*Commodore*, *supra*, 32 Cal.3d at p. 217, fn. omitted.)

The court further noted "the possibility that an action might lead to punitive damages may enhance the willingness of persons charged with violations to offer fair settlements during the [administrative] conciliation process." (*Commodore*, *supra*, 32 Cal.3d at p. 218, fn. omitted.) There is a fundamental policy promoting the right to seek and hold employment free of prejudice. (*Id*. at p. 220.) FEHA's "aim is to provide effective remedies against the evil." (*Ibid*.) *Commodore* further reasoned: "To limit the damages available in a [FEHA] lawsuit might substantially deter the pursuit of meritorious claims, even where litigation expenses are payable to the successful employee." (*Id*. at pp. 220-221.) Accordingly, *Commodore* concluded: "Absent a convincing statement of contrary legislative intent, we rule that, *in a civil action under* [*FEHA*], *all relief generally available in noncontractual actions*, including punitive damages, *may be obtained*." (*Id*.

at p. 221, italics added.) Therefore, the court denied the writ of mandate sought by the employer. (*Ibid*.)

Lost wages. Preovolos does not dispute that compensatory damages, including lost wages, generally may be awarded in tort and other noncontract cases if proximate causation of those damages is shown. (See, e.g., Civ. Code, § 3333.) Rather, he seeks to create an exception to that compensatory damages rule in FEHA cases in which the victim of discrimination or harassment resigns, but is not constructively discharged. However, we do not discern any justification, whether based on FEHA's language or its underlying public policy, for that exception to the general compensatory damages rule.

Although California courts often look to Title VII federal cases when interpreting FEHA, they do so "[o]nly when FEHA provisions are similar to those in Title VII." (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 74.) "[D]ifferences between [Title VII] and [FEHA] diminish the weight of the federal precedents." (*Commodore, supra*, 32 Cal.3d at p. 217.) The relief provisions of Title VII and FEHA are so fundamentally different that federal cases determining the availability of back pay under Title VII provide no precedential value in determining the availability of lost wages and other compensatory damages under FEHA.

As discussed above, *Commodore* held "FEHA does not limit the relief a court may grant in a statutory suit charging employment discrimination." (*Commodore, supra*, 32 Cal.3d at p. 215.) It stated: "When a statute recognizes a cause of action for violation of a right, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears." (*Ibid*.) *Commodore*

did not discern any contrary legislative intent. (*Ibid*.) Therefore, it pronounced the general rule that "*in a civil action under* [*FEHA*], *all relief generally available in noncontractual actions*, including punitive damages, *may be obtained*." (*Id*. at p. 221, italics added.)

In contrast, Title VII's language expressly precludes an award of back pay as *compensatory* damages. Title VII originally provided *equitable* relief as the only remedy for unlawful discrimination, stating:

> "If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . , the court *may enjoin* the respondent from engaging in such unlawful employment practice, *and order* such affirmative action as may be appropriate, which may include, but is not limited to, *reinstatement* or hiring of employees, *with or without back pay . . . , or any other equitable relief* as the court deems appropriate. . . ."[6] (42 U.S.C. § 2000e-5(g)(1), italics added.)

Although 42 U.S.C. § 1981a, enacted in 1991, amended Title VII to also allow recovery of compensatory and punitive damages in addition to equitable remedies under 42 U.S.C. section 2000e-5(g)(1), that amendment defined "compensatory damages" as excluding back pay and other equitable relief, stating: "*Compensatory damages* awarded under this section *shall not include* [*back pay*], interest on [back pay], or any other type of relief authorized under [42 U.S.C. § 2000e-5(g)]."[7] (42 U.S.C. § 1981a(b)(2), italics added;

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6 See, e.g., *U.S. v. Burke* (1992) 504 U.S. 229, 240 ("the circumscribed remedies available under Title VII [before the 1991 amendment] stand in marked contrast not only to those available under traditional tort law, but under other federal antidiscrimination statutes, as well").

7 42 U.S.C. § 1981a(a)(1) provides: "In an action brought by a complaining party under [42 U.S.C. § 2000e-5] against a respondent who engaged in unlawful intentional

see generally, *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 252-253.) Accordingly, under Title VII, an award of back pay may be obtained only in conjunction with equitable relief (e.g., a reinstatement order) awarded by the court; it cannot be awarded as compensatory damages.

Because there is no language in FEHA (or any other California statute) limiting the definition of compensatory damages available in FEHA cases or, more specifically, excluding lost wages as a component of compensatory damages, we conclude Title VII's provisions that expressly limit the availability of back pay are so fundamentally different that the federal cases determining the availability of back pay under Title VII, including those cases on which Preovolos relies, are inapposite to this and other FEHA cases. Accordingly, the Title VII federal cases that limit back pay awards to those cases involving actual or constructive discharge provide no precedent, or persuasive authority, on the issue of whether lost wages are available as compensatory damages for sexual harassment under FEHA.

Furthermore, we are not persuaded by Preovolos's assertion that the purposes and policies underlying FEHA would be better served were we to adopt his proposed exception to the general rule that compensatory damages, including lost wages, may be recovered in FEHA cases in which sexual harassment proximately causes those damages. He asserts the purposes of FEHA would be promoted if an employee who suffers sexual harassment or other unlawful discrimination is encouraged to remain on the job and allow

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discrimination . . . , the complaining party may recover *compensatory* and punitive *damages as allowed in subsection (b)* of this section, in addition to any relief authorized by [42 U.S.C. § 2000e-5(g)]." (Italics added.)

his or her employer, within the employment relationship, to remedy the effects of harassment or other discrimination and prevent it in the workplace in the future. He argues that a rule precluding an employee from resigning and then seeking lost wages, without first showing he or she was constructively discharged, would encourage the employee to remain on the job and allow the employer to remedy the sexual harassment or other discrimination. That rule, according to Preovolos, would further the purposes of FEHA.

However, rather than furthering the purposes of FEHA, we believe Preovolos's proposed rule would have the opposite effect. If an employee is precluded from seeking lost wages as part of compensatory damages proximately caused by sexual harassment or other discrimination, he or she arguably may not be "made whole," the purpose of compensatory damages under FEHA. (*Cloud*, *supra*, 76 Cal.App.4th at pp. 906, 909.) Alternatively stated, to the extent an employee is prevented from proving the full extent of damages necessary to make him or her "whole," including lost wages, the purposes of FEHA are not promoted. (*Id*. at p. 909.) By preventing a victim of sexual harassment or other discrimination from seeking those damages to be made whole, that employee will have a disincentive to file, and may be discouraged from filing, a FEHA action to remedy that unlawful conduct.[8]

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8 Contrary to Preovolos's assertion, rejection of his proposed rule will not encourage victims of sexual harassment or other discrimination to simply quit their jobs and sue without first trying to resolve matters from within the employment relationship. That argument underestimates the burden that litigation places on FEHA plaintiffs. (See, e.g., *Martini v. Boeing Co.* (Wash. 1999) 137 Wash.2d 357, 376 [971 P.2d 45, 55].) "A

In contrast, if an employer knows it may be liable for lost wages proximately caused by workplace sexual harassment or other discrimination, that employer will have an incentive to work with employees to prevent sexual harassment and other discrimination in the workplace. We conclude the purposes of FEHA are better served by rejecting Preovolos's proposed rule and confirming that a victim of sexual harassment or other discrimination who resigns from his or her job may seek compensatory damages under FEHA, including lost wages, proximately caused by that unlawful conduct without proving he or she was constructively discharged.

Proximate cause. Contrary to Preovolos's assertion, we conclude that when a victim of sexual harassment or other discrimination resigns without being constructively discharged, that victim's resignation is *not*, as a matter of law, the "proximate cause" of his or her lost wages or other compensatory damages. Rather, a FEHA plaintiff bears the burden at trial to prove, by a preponderance of the evidence, the alleged sexual harassment or other discrimination proximately caused those lost wages and/or other compensatory damages. (Civ. Code, § 3333.) Proximate cause is a question of fact for the trier of fact and generally cannot be decided as a matter of law. Accordingly, when a jury is properly instructed on proximate causation and a plaintiff's duty to mitigate damages, we are confident that a jury in a FEHA case will award lost wages only when the plaintiff proves they are proximately caused by the defendant's unlawful sexual

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rational employee is unlikely to decide that quitting and suing is easier than attempting to resolve a dispute in the workplace." (*Ibid.*)

harassment or other discrimination under FEHA.[9] (See, e.g., CACI No. 3961 [mitigation of damages].) Lost wages are unlikely to be awarded when it is reasonable, or viable, for a victim of sexual harassment or other discrimination to remain on the job despite that unlawful conduct. (Cf. *Cloud*, *supra*, 76 Cal.App.4th at p. 908.)

Conclusion. Based on our consideration of *Cloud*, *Commodore*, and the FEHA's language and purposes, we conclude Terry was properly awarded economic damages, including lost wages, against Preovolos for his unlawful sexual harassment even though the jury found she had not been actually or constructively discharged from employment.[10] In general, a victim of sexual harassment or other discrimination under FEHA who resigns from his or her job may seek and be awarded lost wages and other compensatory damages proximately caused by such unlawful conduct, without proving that he or she was constructively discharged.

D

Preovolos also apparently argues the evidence in this case does not show his sexual harassment proximately caused Terry's alleged lost wages. In support of that argument, he cites Terry's resignation letter, which expressed her dismay that Firm hired

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9 Because Preovolos has not included the trial court's jury instructions in the record on appeal, we need not, and do not, address whether the court's instructions adequately instructed the jury on these issues.

10 We reject Preovolos's assertion that *Cloud*'s reasoning and holding should be limited to FEHA cases involving failure to promote based on unlawful discrimination. We discern no reason why *Cloud*'s reasoning should not apply to all types and circumstances of unlawful discrimination under FEHA, including the circumstances in this case.

a person who she perceived to be her replacement as the office manager. Citing his letter to Terry asking her to reconsider her resignation and offering to keep her position open for one week, Preovolos argues her resignation, followed by her failure to reconsider her resignation and return to work, was the true cause of her lost wages. Therefore, based on the evidence in this case, he argues his sexual harassment could not have been the proximate cause of Terry's lost wages.

However, Preovolos's argument is, in effect, that the evidence is insufficient to support the jury's finding that his sexual harassment proximately caused Terry's lost wages. By so arguing on appeal, he has the obligation to provide an adequate record on appeal and fairly set forth all material evidence on that issue, including evidence supporting the jury's verdict. He has not done so. His briefs omit any reference to Terry's dismay expressed in her resignation letter regarding "the inappropriate conduct that occurs on a daily basis in this firm, [e]specially the sexually explicit behavior, conversations, e[-]mails and jokes." His briefs also wholly omit any reference to Martin's testimony. Martin testified Preovolos frequently made jokes of a sexual nature, including at Firm meetings, and continued to do so through the time of trial. That testimony would support a reasonable inference that even had Terry returned to Firm, Preovolos's sexual harassment likely would have continued and therefore she acted reasonably by not returning to work at Firm.

Furthermore, by stipulating on appeal to an "Agreed Statement" with selected exhibits as constituting the record on appeal, Preovolos has not included in the record on appeal any of Terry's trial testimony or the testimony of her other witnesses (except

Martin) that presumably would have been favorable to Terry and supported the jury's verdict. By not providing a complete record and setting forth an objective and fair statement of the material evidence regarding the issue of proximate causation, Preovolos has waived or forfeited that contention. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132; *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435; *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1002-1003; *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039; *Arechiga v. Dolores Press, Inc.* (2011) 192 Cal.App.4th 567, 571-572; *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409-410.) In any event, based on the limited evidence contained in the record on appeal, it appears there is substantial evidence to support the jury's finding that Preovolos's sexual harassment proximately caused Terry's lost wages.

DISPOSITION

The judgment is affirmed. Terry is entitled to costs on appeal.

McDONALD, J.

I CONCUR:

NARES, Acting P. J.

I CONCUR IN THE RESULT:

O'ROURKE, J.